1991

Pratt v. Prodata : Reply Brief

Utah Supreme Court

Brene S. Broadbent; attorneys for appellee.
Eric C. Olson; Van Cott, Bagley, Cornwall & McCarthy; attorneys for appellants.

IN THE SUPREME COURT

STATE OF UTAH

JOHN P. PRATT, Plaintiff/Appellee, vs. PRODATA, INC. and WILL McCOY, Defendants/Appellants.	Case No. 910248 Priority No. 16

Appeal from Third District Court, Salt Lake County, Utah
Honorable J. Dennis Frederick

REPLY BRIEF OF APPELLANTS

Eric C. Olson, Esq.
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333
Attorneys for Appellants

Berne S. Broadbent, Esq.
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 363-1800
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

IN THE SUPREME COURT

STATE OF UTAH

JOHN P. PRATT, Plaintiff/Appellee, vs. PRODATA, INC. and WILL McCOY, Defendants/Appellants.	Case No. 910248 Priority No. 16

Appeal from Third District Court, Salt Lake County, Utah
Honorable J. Dennis Frederick

REPLY BRIEF OF APPELLANTS

Eric C. Olson, Esq.
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333
Attorneys for Appellants

Berne S. Broadbent, Esq.
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 363-1800
Attorneys for Appellee

The defendants-appellees Prodata, Inc. ("Prodata") and Will McCoy ("McCoy"), through counsel, submit this brief in reply to the Brief of Appellee ("Appellee's Brief") submitted by the plaintiff-appellee John P. Pratt ("Pratt").

REPLY TO APPELLEE'S STATEMENT OF CASE

Pratt and McCoy offer the following observations regarding the Statement of the Case set forth in Appellee's Brief:

1. Allegations of Falsehood--In his exposition of the allegations on which this action is based at pages 3 and 4 of Appellee's Brief, Pratt fails to note that his First Cause of Action, the sole claim that went to the jury, specifically alleged that "Defendants have made false and deceptive representations" and that these "representations made by Defendants were false, and defendants knew or should have known of such falsity. . . ." (R. 2-13 at paragraphs 25 and 29.)[1]

2. Issues Preserved from the Trial--At footnote 3 of Appellee's Brief, page 5, Pratt seems to suggest that issues remain in this action with respect to the correctness of the trial court's instructions to the jury on the element of improper means under Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982). However, the record does not reflect any cross-appeal with respect to the trial court's handling of these

[1]The references to the record and exhibits in this Reply Brief follow the format previously adopted in the Appellants' Brief at p. 4, fn. 1. References to the Addendum are to the attachments to the Brief of Appellants dated August 26, 1991.

issues. As a consequence, under the most basic principles of appellate practice, these points are no longer issues in this action and the trial court's ruling is law of the case. See, e.g., Tracy v. University of Utah Hospital, 619 P.2d 340, 342 (Utah 1980); Detonics ".45" Associates v. Bank of California, 97 Wash.2d 351, 644 P.2d 1170, 1172 (1982) ("[s]ince plaintiffs did not appeal the finding by the trial court . . ., this becomes the law of the case").

3. The Act of Interference--Pratt's five-page Statement of the Facts at pages 6 through 10 of Appellee's Brief is most telling in its almost entire neglect of the central event of the case--the moment of interference by Prodata and McCoy. This crucial contact is summarized on page 9 in the single phrase: "McCoy met with UDOT officials on several occasions to discuss Hartle and Pratt." Clearly, where one seeks to hold another liable for intentional interference with economic relations through improper purpose, the nature of the actual interference is of more than passing interest. The evidence at trial showed, at most, three meetings between UDOT and McCoy--one merely a meeting to set up a meeting and another occurring after the decisions to terminate Pratt had been made. (T. 225-26, 355-56.) Significantly, the meetings dealt with both Hartle and Pratt; Pratt was not singled out. To the contrary, based on the most contemporary and neutral account, Pratt was incidental to the discussion. (Addendum 3.)

ARGUMENT

I. THE JURY'S FINDING THAT THE DEFENDANTS SPOKE TRUTHFULLY PRECLUDES THE ENTRY OF JUDGMENT FOR INTERFERENCE WITH ECONOMIC RELATIONS.

Pratt offers three reasons why the defendants' transmission of truthful information, as the jury found, was actionable. None of these reasons is sufficient to prevent entry of judgment in favor of Prodata and McCoy.

A. Truth Is Not A "New Affirmative Defense."

Pratt's characterization of truth as a "new affirmative defense" overlooks the record in this action. As noted above, Pratt himself put the truth of the defendants' statements in issue with the filing of his Complaint. In other words, relying solely on the transmission of information for the alleged interference, Pratt undertook the burden of proving in the first instance that the offending words were false. The defendants denied this allegation and thus put Pratt to his proof. (R. 90-104 at paragraphs 25 and 29.) This procedure comports with the highly analogous area of defamation in which the plaintiff would have the burden of proving the falsity of the statement as a predicate to recovery. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986); Caruso v. Local Union No. 690, 107 Wash. 2d 524, 730 P. 2d 1299. 1302 (1987) ("as a private defamation plaintiff, [one] has the burden of proving falsity").

B. The Jury Made the Requisite Finding.

Pratt insists that the jury's finding at Special Verdict 3(a) does not suffice to establish that McCoy transmitted truthful information to UDOT. The jury was asked: "Did the defendants make a false statement about a presently existing fact to the Utah Department of Transportation?" To this, the jury responded: "No." (R. 701.) Inasmuch as Pratt relied solely on the transmission of information in alleging wrongful interference, the finding that no falsehood was communicated to UDOT is the same as finding that any alleged interference involved only truthful information. Further, Pratt offers no authority for the apparent suggestion that the application of a clear and convincing standard renders the jury's finding inapposite. As already noted, in the absence of a cross-appeal, Pratt's problems with the trial court's instructions to the jury are not properly before this Court on appeal.

C. Consistency and Sound Policy Dictate that Truthful Information Not Be an Acceptable Basis for a Claim of Wrongful Interference with Economic Relations.

Pratt argues, without citation to authority, that the issue of truth is relevant only to a consideration of the improper means alternative under the Leigh Furniture test for wrongful interference with economic relations. Admittedly, there is no authority explaining how Restatement (Second) of Torts § 772(a) (1979) relates to application of the Oregon

definition of the tort of wrongful interference adopted by this Court in Leigh Furniture. However, the Wisconsin and Wyoming authorities cited in Appellants' Brief at pages 14 and 15 clearly undermine the conclusion urged by Pratt that an improper purpose can make truth telling, absent more, an adequate basis for a finding of wrongful interference.

In the end, the issue is one of consistency and public policy. The transmission of truthful information is not only a proper means--it is a constitutional right. The analogy with the law of defamation has already been noted. (In fact, comment b to Section 772 refers the reader to Restatement (Second) of Torts § 581A (1977) which states: "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.") Comment a to Section 581A notes that constitutional provisions making truthful defamatory statements actionable if made for "malicious motives" (the very result advocated by Pratt) have been held to violate the First Amendment to the United States Constitution. See, e.g., Garrison v. State of Louisiana, 379 U.S. 64, 74 (1964); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975); Wright v. Southern Mono Hospital District, 631 F. Supp. 1294, 1326 (E.D. Cal. 1986) ("Truth of the statements made is a complete defense against civil liability for defamation, regardless of bad faith or malicious purpose" [emphasis added]).

Pratt should not be allowed to secure under the guise of "wrongful interference" what he would be denied under the law

of defamation--money damages for the transmission of truthful information. Not only is such a result inconsistent, it runs counter to the policies underlying the tort of wrongful interference. That tort seeks to balance two societal interests--the interest in unfettered commercial activity and the interest in being free from improper interference by others in the pursuit of such activity. When such a claim is based solely on the transmission of information, a third interest of constitutional proportions is implicated--the right to freely speak the truth. That interest is preeminent, particularly in the functioning of our free enterprise system. The flow of truthful information, no matter how much that information hurts, drives our financial markets, our consumer purchases, and our corporate business decisions.

If the constitutional protection such information receives can be overridden with a simple allegation of "improper purpose," then more commercial entities than Prodata stand at risk. For instance, the stockbroker who recommends against the purchase of a security based on accurate information known to her must nonetheless answer to the jury for her motive when the seller of the security alleges wrongful interference. Similarly, the merchant who correctly notes the difference in quality between his product and that of a competitor must still face trial on the issue of improper purpose. In the present action, McCoy's truthful statements regarding the covenant not to compete have become the basis for a money judgment because of

the jury's assessment that they were made with an improper purpose. This result contradicts the basic expectation of the marketplace that one is permitted to tell the truth without fear of legal action. It provides every disgruntled competitor with an avenue to settle commercial scores under the heading of wrongful interference. This is bad policy for both the courts and the free market.

II. PRATT HAS FAILED TO POINT TO EVIDENCE IN THE RECORD THAT WOULD SUPPORT A REASONABLE INFERENCE THAT, IN CONTACTING UDOT, DEFENDANTS ACTED WITH A PREDOMINANT PURPOSE TO HURT PRATT FOR THE SAKE OF INJURY ALONE.

Pratt was required to prove at trial that, on September 28 and 29, 1989, McCoy spoke to UDOT regarding Pratt with a "predominant purpose," not to further Prodata's economic interests, but to hurt Pratt for "the sake of injury alone." Leigh Furniture, supra, 657 P. 2d at 307-08. In Appellee's Brief, Pratt cites no direct evidence of McCoy's intent during the relevant two-day period. (In fact, all direct evidence--from McCoy and from UDOT--indicates a pure economic motive.) Pratt seeks to rely on "reasonable inferences" drawn from "competent evidence," Gustaveson v. Gregg, 655 P. 2d 693, 695-96 (Utah 1982), but is ultimately forced to advance evidence that would support the element of improper purpose, if at all, only with an overwhelming measure of "surmise, speculation, or conjecture." Harsha v. State Savings Bank, 346 N. W. 2d 791, 800 (Iowa 1984) ("Circumstantial evidence must do more than raise a suspicion; it must amount to proof").

A. Pratt's Manipulation of the Evidence.

The Brief of Appellants filed August 26, 1991 provides the Court with the entire relevant testimony of Pratt's witnesses without editing, commentary or transposition. (In his Appellee's Brief, Pratt has not cited to any significant additional testimony.) What Prodata and McCoy have cited to this Court is what the jury actually heard and the record on which the jury's verdict must rest. In contrast, Pratt in Appellee's Brief has offered this Court a mere commentary on the evidence with only minimal quotations and essentially no context. Cf., Rule 106, Utah Rules of Evidence; Monlux v. General Motors Corp., 714 P.2d 930, 935 (Hawaii 1986).

Prodata and McCoy respond to the Appellee Brief's characterization of the evidence on a witness-by-witness basis as follows:

1. Roger Clawson (Appellee's Brief, p. 15)--Pratt contends that McCoy was "very unhappy" (apparently quoting Roger Clawson) with Pratt for "no legitimate business reason." However, the actual testimony of Roger Clawson was as follows: "[T]he subject of John Pratt came up and the gist of the conversation was that Will was unhappy with John Pratt's conduct of terminating his contract and going to work directly for a client." (Addendum 10; emphasis added.) As recounted by Mr. Clawson, McCoy linked his unhappiness directly to Pratt's termination of his contract. The jury could hardly believe McCoy was "unhappy" and then disregard his further admission as

to the business reason for his unhappiness. Certainly there was nothing in this exchange to provide even circumstantial evidence of a purpose six months later to hurt Pratt for the sole sake of inflicting pain.

B. Glen Read (Appellee's Brief, p. 15)--Pratt contends that McCoy had no business reason for telling Mr. Read to "stay away" from Pratt. In fact, Mr. Read testifies that McCoy told him "not [to] have any dealings with Mr. Pratt because he believed that he was a bad influence. . . ." According to Mr. Read, McCoy accused Pratt of doing "several things that were professional unethical" and "that he had done things that were far worse than anything I knew about." Mr. Read then admitted that he himself was aware of conduct on the part of Pratt that he deemed to be "inappropriate." (Addendum 11.) That conduct, as disclosed by Mr. Read, was indisputably business related.

For his part, McCoy freely admitted that he directed Prodata employees (including presumably Mr. Read) to stay away from Pratt:

> Q. You don't remember any instances of telling anyone to stay away from John Pratt?
>
> A. I have done that, but I explained why.
>
> Q. Why was that?
>
> A. Because when Mr. Pratt left the subcontract arrangement in March of 1989, to me he appeared to be very bitter, he had some negative words about our company, and I asked our employees that it would be best if they stayed away from him

because his attitude was not the best and I told them that he did not care for Pro-Star.

Q. You're not aware of anything bad that John Pratt's done or that you would consider bad, are you?

A. I'm not.

Q. You never told anybody that John Pratt's done anything bad, have you?

A. No, I have not.

(T. 169-70.)

Again, with this testimony and that of Mr. Read, Pratt wants to modify, and then to cut and paste. McCoy testified as to the business purpose of his admonitions to stay away from Pratt. For his part, Mr. Read freely acknowledged a business justification for the accusation of misconduct. On the other hand, McCoy denied knowing or saying anything bad about Pratt. To concoct sufficient evidence, Pratt now asks this Court to accept that the jury believed McCoy's protestations of ignorance of any wrongdoing, but disbelieved his denial in the same breath that he made any accusations of wrongdoing. Then, to complete the scenario, Pratt contends that the jury must believe Mr. Read's testimony as to McCoy's accusations, but disbelieve Mr. Reid's testimony regarding the business justification arising from Pratt's questionable conduct. It is all a bit confusing and, in the end, unavailing. This mixing of the evidence does not "raise a suspicion," much less "amount to proof," that McCoy entertained malice toward Pratt that overrode all other motivations when, nearly five months later, McCoy

approached UDOT regarding Pratt's breach of the covenant not to compete.

C. Christopher Crocker (Appellee's Brief, pp. 15-16)--Pratt errs in citing Mr. Crocker for the proposition that McCoy, in June, 1989, accused Pratt "of taking contracts away from Prodata and violating his non-compete obligation to Prodata. . . ." Rather, in his testimony, Mr. Crocker was careful to note that Pratt's name was not mentioned:

> A. Okay. What I have to do is back up in time. Not knowing at the time who John Pratt was and not having his name mentioned, a statement at a luncheon by Mr. McCoy and also backed up by Mr. Basham was that contractors had taken contracts, consequently, money away from Pro-Star, that they had violated their no compete clause and Pro-Star intended to make an example of them.
>
> (Addendum 9, emphasis added.)

There is absolutely no evidence that McCoy was actually referring to Pratt.

Even if McCoy were referring to Pratt and the jury chose to believe Mr. Crocker's testimony, all that is proven is that McCoy did indeed have knowledge of Pratt's breach of the covenant not to compete at an earlier date than McCoy himself acknowledged in his testimony. It will not do to say that the jury believed McCoy's professions of ignorance and then believed that he manufactured the June, 1989 claim of breach to which Mr. Crocker testified. This certainly is not what Mr. Cocker believed:

> Q. [Y]ou understood all along and throughout this thing what was motivating those statements was

the fact that somebody at Pro-Star believed there had been a violation of some noncompetition clauses, right?

A. Yes.

Q. And throughout the time as you observed those individuals who were making these statements, Mr. McCoy specifically, it was clear that he sincerely believed that that was the case.

A. That's my belief.

(Addendum 9.)

On another point, McCoy's apparent pleasure after meeting with Pratt and Hartle (a meeting that neither Pratt nor Hartle nor McCoy remembered) proves nothing regarding McCoy's state of mind in contacting UDOT. Pratt offers no explanation for how an open demonstration of pleasure in the advantage over a competitor makes the fact that McCoy hated Pratt and wished him harm for harm's sake alone any more likely than a more benign, competitive motive.

D. Ronald Hartle (Appellee's Brief, p. 16)--Contrary to Pratt's assertion in Appellee's Brief, Hartle testified that Mr. Basham, and not McCoy, told Mr. Hartle that "he [Basham] would take whatever means he could to get [Hartle] out of UDOT." (Addendum 13.) There is no principle of law that transforms Mr. Basham's statement into that of McCoy. Further, Mr. Basham's statement as recited by Mr. Hartle is not one of intent, but a representation as to the action Mr. Basham intended to take. It is mere speculation to read into the remarks a motive to hurt as opposed to a purpose to protect Prodata's long-term economic

interests. And it approaches the realm of purest surmise to conclude that any intent inferred was also directed at Pratt and was shared by McCoy. As with the examples previously cited, Pratt strings such conjectures together like so many misfit tinker toys resulting in a construction of the evidence that is as unwieldy as it is absurd.

E. Charles Christensen (Appellee's Brief, p. 16)-- Prodata's failure to first contact Pratt regarding his breach of the covenant not to compete proves nothing with respect to McCoy's purpose in contacting UDOT. There is no principle of law that requires a party to first contact the offending party before alleging a breach of contract or be deemed to have acted with malicious intent. Charles Christensen most aptly and conclusively recalled that McCoy described his dealings with UDOT as a "business arrangement." (Addendum 12.) Such an admission, if believed (as Pratt clearly feels it should be), belies the notion that the defendants acted with any overriding desire to hurt Pratt for the sake of injury alone rather than with a "legitimate long-range economic motivation."

B. The Evidence Will Not Support The Finding That The Defendants Acted With An Improper Purpose.

To evaluate McCoy's purpose in contacting UDOT, The jury had to get inside of McCoy's mind. This is a treacherous inquiry even with the clearest of evidence. This Court recognized in Leigh Furniture "[the] [p]roblems inherent in proving motivation or purpose. . . ." 657 P. 2d at 307. Such

problems are legion on the record in this action. Pratt has failed to cite to any evidence on which the jury could have based a finding that Prodata or McCoy entertained any desire to injure Pratt "as an end in itself" or "for the sake of injury alone." Leigh Furniture, 657 P. 2d at 307-08. Even more remote from the actual evidence before the jury is evidentiary support for the essential proposition that such a malicious motive predominated over all other motives. Even Pratt's characterization of the evidence, which is neither the testimony actually heard by the jury nor a fair reading of that testimony, fails to meet the sufficiency of the evidence test.

III. THE DEFENDANTS' CONDUCT WAS NOT THE LEGAL CAUSE OF PRATT'S LOSS.

Pratt fails to meet the thrust of the defendants' argument with respect to proximate cause. At the outset, the sole significance of the defendants' concession regarding cause in fact is that the jury's finding in this regard appears to be supported by evidence sufficient under the applicable legal standard and, therefore, not worth serving as the basis of an appeal. However, under Bennion v. LeGrand Johnson Construction Co., 701 P. 2d 1078, 1083 (Utah 1985), that factual finding does not end the inquiry as to proximate or legal cause. This Court must apply "considerations of common sense and policy" to determine whether the acts of the defendants are the proximate cause of Pratt's loss. McKellips v. Saint Francis Hospital, Inc., 741 P. 2d 467, 470 (Okl. 1987). Pratt does not dispute his

clear testimony at trial that he utterly refused any settlement with Prodata (the party in the right) that did not require a complete capitulation on the part of Prodata. Pratt himself broke off all negotiations with Prodata. Despite his clear violation of a valid covenant not to compete and UDOT's unequivocal explanation of the long-term adverse consequences to Pratt flowing from a failure to settle matters with Prodata, Pratt accepted the inevitable loss of over $84,000 in contracts with UDOT rather than pay a penny to Prodata.

In the final analysis, Pratt was the master of his own destiny. However improper Prodata's purpose might be deemed, the termination by UDOT could have been reversed through a simple compromise. Hartle did so and returned to work. Pratt elected to reject compromise and ended up in litigation seeking damages arising directly from that refusal to settle. The policy of this Court should be that those who walk with eyes open into a situation which will result in loss cannot blame another for those losses. Common sense dictates this result in the present action. Prodata should not bear the damages resulting from Pratt's free choices over which Prodata had absolutely no control.

IV. PRATT HAS OFFERED NO EVIDENCE TO SUPPORT THE JURY'S RESOLUTION OF THE COUNTERCLAIM.

Pratt has failed to cite this Court to any evidence on which the jury could have based a finding that Pratt's breach of the covenant not to compete did no harm to Prodata's goodwill.

Pratt misses the point in contending that the project on which he was working when he left Prodata suffered no harm and that he continued to do his contract work for Prodata while secretly working for UDOT in March and April, 1989. As this Court has repeatedly emphasized, the sole legitimate purpose for a covenant not to compete is to protect an employer's goodwill in a valuable employee. See System Concepts Inc. v. Dixon, 669 P. 2d 421, 426 (Utah 1983); Allen v. Rose Park Pharmacy, 237 P. 2d 823, 827 (Utah 1951). Thus, the damages Pratt claims not to have caused are unrelated to those to be avoided through enforcement of the covenant not to compete.

The mere fact that Pratt knew one of the individuals with whom he worked at UDOT for a period of time before Pratt was employed with Prodata does nothing to disprove an injury to Prodata's goodwill. At trial, Pratt acknowledged that it was under the terms of the Employment Agreement containing the covenant not to compete (Ex. 11) that he first went to work for UDOT. (T. 52.) Further, the very UDOT employee who previously knew Pratt reviewed Pratt's employment contract with McCoy in connection with a UDOT project. (T. 322.) In other words, Pratt first entered UDOT and thereafter worked at UDOT under the Prodata banner. In that capacity, he engendered much goodwill for Prodata as evidenced by UDOT's willingness to hire him even while he was still working on another project for Prodata. The covenant not to compete was tailored specifically to protect that goodwill. The liquidated damages clause enforcing that

covenant was intended to constitute a reasonable estimate of these most real but elusive damages. Given the complete absence of evidence in the record refuting the fact of an injury to Prodata, the jury's finding as to the Counterclaim must be set aside.

CONCLUSION

Pratt has failed to advance law or facts of record that would support the resolution of this matter in the trial court. In contrast, the defendants have demonstrated that the jury's findings and the trial court's application of the law are without adequate basis. This Court should reverse the Judgment of the trial court and enter Judgment in favor of the defendants on both the Complaint and the Counterclaim.

DATED this 14th day of November, 1991.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By _____

Eric C. Olson
Attorneys for Defendants
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing REPLY BRIEF OF APPELLEES to be mailed, postage prepaid this 14th day of November, 1991, to the following:

Berne S. Broadbent, Esq.
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111